

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

William A. Newsom

)

Plaintiff,

)

v.

)

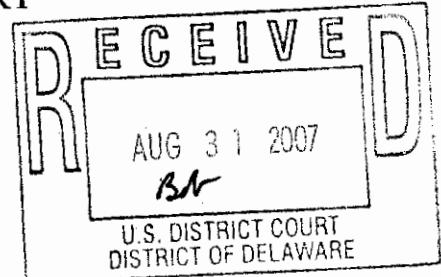
Civil Action No. 05-673GMS

Stanley W. Taylor, et al.

)

Defendant.

)



Brief in Opposition to Defendant FCM's Motion to Dismiss

Now comes the plaintiff, William A. Newsom, pro-se, moving this honorable court to deny the defendant's motion to dismiss pursuant to F.R.C.P. 12(b)(6) for failure to state a claim. In support of this brief, the plaintiff offers the following:

Background

1. Plaintiff is an inmate in the Delaware Correctional System.
2. Defendant's FCM were the medical providers for the Delaware Correctional System from July 1, 2002 to June 30, 2005.
3. In plaintiff's complaint, he alleges civil rights violations against defendant's FCM for lack of proper health care that rises to meet deliberate indifference standards.
4. On May 18, 2007, defendant's FCM filed a motion to dismiss.

Legal Standards

5. Defendant's claim that there is no vicarious liability for civil rights claims, citing Hyson v. Correctional Medical Services, C.A. No. 02-318(SLR)(D.Del. Feb. 6, 2003). This claim should be dismissed. In the case at bar, plaintiff has established that defendant's FCM

had actual knowledge and acquiescence of plaintiff's fractured and dislocated finger, and yet ignored the outside orthopedic surgeon's recommendation for significant reconstructive hand surgery (see Exhibit A). Defendant's FCM performed radiographs and submitted them to Diagnostic Imaging Associates for interpretation. Their report showed a fractured and dislocated finger as well (see Exhibit B). Furthermore, plaintiff exhausted his administrative remedies through the level III process where the Bureau Chief upheld the plaintiff's appeal request. At this point, according to the appeal grievance information, defendant's FCM agreed to send the plaintiff back out for another hand surgeon consult on March 11, 2005 (see Exhibit's C1, C2, and C3). Defendant's FCM never did send the plaintiff out as they agreed to do. To add to the plaintiff's claim of the defendant's personal involvement and knowledge, defendant's FCM had a policy established showing that before an individual could be sent for treatment outside of the institution, a "consult request" had to be personally be approved by them first. This shows that defendant's FCM had direct knowledge of plaintiff's unresolved healthcare problem. Plaintiff has attached as an example, a copy of a "consultation request" (see Exhibit D).

Plaintiff cites: *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Rode v. Dellarciprete*, 845 F.2d. 1195, 1207 (3rd Cir. 1988); *Swan v. Daniels*, 923 F. Supp. 626, 633 (D.Del. 1995); and *Natale v. Camden County Correctional Facility*, 318 F.3d. 575, 584 (3rd Cir. 2003). These cases support the plaintiff's claim that his complaint along with physical documentation is sufficient in showing that defendant's FCM had actual knowledge with appropriate particularity regarding their personal involvement.

6. Defendant's claim plaintiff did not file an affidavit of merit pursuant to 18 Del. C. 6853(a)(1). Plaintiff is not alleging medical negligence, but rather a civil rights claim of deliberate indifference. An affidavit of merit is not needed in the case at bar, and this claim by the defendant's should be dismissed as well.

7. Under these legal standards, defendant's FCM's motion to dismiss is unwarranted.

Plaintiff clearly has not failed to state a claim against defendant's FCM.

When analyzing a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true all allegations of the complaint in favor of the plaintiff, *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc.*, 1 F.3d. 478, 483 (3rd Cir. 1998).

Furthermore, a complaint should only be dismissed when the plaintiff can prove no set of facts in support of his claim, *Kost v. Kozakiewicz*, 1 F.3d. 176, 183 (3rd Cir. 1993); *Amiot v. Kemper Insurance Company*, 122 Fed. Appx. 577, 579 (3rd Cir. 2004).

Conclusion

For all the above reasons, the plaintiff respectfully request that defendant's FCM's motion to dismiss be denied.

Respectfully submitted,

William A. Newsom

William A. Newsom
SBI#257317
Delaware Correctional Center
1181 Paddock Road
Smyrna, Delaware 19977

Date: August 29, 2007

3734300

William Newsome—
DOB: 8/10/72

10/17/03 Letter to Dr. Tatagari

CC: Right long finger pain.

HPI: This is a 31-year-old, right hand dominant male who presents after sustaining an injury to his right long finger approximately 4 weeks ago. He states he sustained a fracture and dislocation of the finger. He was initially treated with attempted closed reduction of the finger. He now presents for further evaluation. He continues to have pain and swelling as well as some deformity about the long finger. He denies any numbness or tingling in the finger. He denies any injury to the remaining digits of the hand.

On PE of the right long finger, there is diffuse swelling about the PIP joint. There is diffuse tenderness to palpation over the PIP joint as well. There is no tenderness over the DIP or MCP joints. There is rotatory malalignment noted of the long finger. Sensation is intact to gross touch. Capillary refill is less than 2 seconds. There is very limited motion at the PIP joint secondary to pain.

X-rays of the right long finger were reviewed. They show a chronic fracture-dislocation of the PIP joint of the long finger with evidence of early callus formation. There is persistent dorsal subluxation of the proximal phalanx.

IMPRESSION: Chronic right long finger dorsal PIP joint fracture-dislocation.

PLAN: The diagnosis was explained to the patient and all questions were answered. At this point, he understands this is going to require significant reconstructive surgery and possible eventual fusion of the joint. It was explained that this should be performed by a hand surgeon at this point. Recommendations for hand surgeons will be made to the correctional facility. This referral should be made as soon as possible to prevent further stiffness at that joint. The patient will return to this office on an as needed basis.

Stephen G. Manifold, M.D./CMW

Diagnostic Imaging
Associates, P.A.

Pike Creek Imaging Enterprises, L.L.C.
3105 Limestone Road Suite 108
Wilmington, DE 19808
(302) 995-2037
FAX (302) 833-6311

October 2, 2003

Xa-Khy Tso, M.D., A.B.R., C.A.Q. (Neuroradiology), Co-Director
Joseph R. Peacock, M.D., Co-Director
Myung Soo Lee, M.D., A.B.R., C.A.Q. (Pediatric & Neuroradiology)
Philip W. Chao, M.D., A.B.R., C.A.Q. (Neuroradiology)
Rita Golicman, M.D., A.B.R.
Ralph Noah, M.D., A.B.R.
Mukhlesh Singh, M.D., A.B.R., M.B.B.S.
Muhammad I. Haq, M.D., A.B.R.

Delaware Correctional Center
1181 Paddock Rd
Smyrna, DE 19977

Note: The radiographs were performed by First Correctional Medical and submitted to Diagnostic Imaging Associates, P.A. for interpretation only.

WILLIAM NEWSOME DOB: 8/10/72 DOS: 9/29/03 Date Submitted: 9/30/03
SBI# 257317

RIGHT HAND

History: Rule-out fracture.

Comments: PA, lateral and external oblique views of the right hand were obtained.

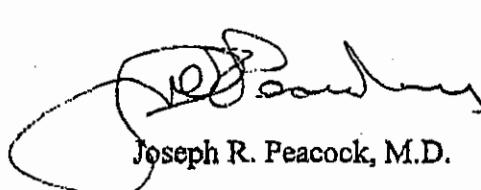
Deformity of the 3rd finger about the proximal interphalangeal joint was noted, a finding which was associated with fragmentation of the volar aspect of the base of the middle phalanx of the 3rd finger and 100% dorsal displacement with 4 mm overriding of the base of the middle phalanx with reference to the proximal phalanx of the 3rd finger and mild circumferential soft tissue prominence. All the latter findings are characteristic of an acute fracture - volar fracture of the "fragment type" and dislocation of the middle phalanx of the 3rd finger. The volar plate fragment of the middle phalanx measures approximately 8 mm in its greatest dimension and involves 50% of the articular surface of the middle phalanx and is separated from the same approximately 4 mm at its greatest point.

The osseous structures, visualized joints and overlying soft tissues otherwise were unremarkable.

IMPRESSION: Right Hand:

1) ACUTE VOLAR PLATE FRACTURE DISLOCATION - MIDDLE PHALANX/3RD FINGER as reviewed.

JRP/pml



Joseph R. Peacock, M.D.

EXHIBIT "B"

Pull chart
B-1017

**DEPARTMENT OF CORRECTION
Bureau of Prisons
245 McKee Road
Dover, Delaware 19904**

May 10, 2005

**Inmate NEWSOM WILLIAM A
SBI # 00257317
DCC Delaware Correctional Center
SMYRNA DE, 19977**

Dear WILLIAM NEWSOM:

We have reviewed your Grievance Case # 5226 dated 07/19/2004.

Based upon the documentation presented for our review, we uphold your appeal request.

Accordingly, there is no further issue to mediate nor Outside Review necessary as provided by BOP Procedure 4.4 entitled "Inmate Grievance Procedure", Level III appeals.

Sincerely,

**Paul W. Howard
Bureau Chief**

EXHIBIT "C-1"

DCC Delaware Correctional Center
Smyrna Landing Road
SMYRNA DE, 19977
Phone No. 302-653-9261

Date: 05/13/2005

GRIEVANCE INFORMATION - BGO

OFFENDER GRIEVANCE INFORMATION

Offender Name : NEWSOM, WILLIAM A	SBI# : 00257317	Institution : DCC
Grievance # : 5226	Grievance Date : 07/19/2004	Category : Individual
Status : Resolved	Resolution Status : Level 3	Inmate Status :
Grievance Type: Health Issue (Medical)	Incident Date : 09/25/2003	Incident Time : 14:00
IGC : Merson, Lise M	Housing Location : Bldg V, Tier D, Cell 1, Single	

REFERRED TO:

Due Date : Referred to: Name:

Type of Information Requested :

DECISION

Date Received : 08/12/2004

Decision Date : 03/15/2005 Vote : Uphold

Comments :

On March 11, 2005 FCM agreed to send the Grievant to an outside hand surgeon consult.



EXHIBIT "C-2"

DCC Delaware Correctional Center
 Smyrna Landing Road
 SMYRNA DE, 19977
 Phone No. 302-653-9261

Date: 05/13/2005

GRIEVANCE INFORMATION - Bureau Chief

OFFENDER GRIEVANCE INFORMATION			
Offender Name : NEWSOM, WILLIAM A	SBI# : 00257317	Institution : DCC	
Grievance # : 5226	Grievance Date : 07/19/2004	Category : Individual	
Status : Resolved	Resolution Status : Level 3	Inmate Status :	
Grievance Type: Health Issue (Medical)	Incident Date : 09/25/2003	Incident Time : 14:00	
IGC : Merson, Lise M	Housing Location : Bldg V, Tier D, Cell 1, Single		
DECISION			
Decision Date: 05/10/2005	Vote : Uphold		
Comments :	I concur with the logic of the BGO's recommendation.		

EXHIBIT "C-3"

FIRST CORRECTIONAL MED.

NO. 9732

035

222 54 1655

CONSULTATION REQUEST

Off-site On-Site Clinic Telemedicine
 Urgent Routine Retro Request
 Inmate: NEALSON, WILLIAM Inmate ID#: 257317 257317
 Site: DCC/CC Cost Center:
 3rd Party Insurance: (VA, Workmen's Comp, Federal, Interstate Compact, etc.):

Reference #: _____
 Date of Request: 2-7-0 _____
 DOB: 8-10-72 _____
 DOI: _____ EDR: _____

For security reasons, inmates must NOT be informed of date, time or location of proposed treatment or possible hospitalization. A notification and payment is provided ONLY for requested procedures or treatments of life-threatening conditions. Prior review/discussion with Medical Director is required for additional treatment, procedures and hospitalizations.

Procedure/Test/Specialty Service Requested: ORTHOPEDICS NEUROSURGERY
 Provider: Initial Visit or F/U? P/U#:

Presumed Diagnosis: LUMBAR DISC DISEASE

Describe Signs & Symptoms: PERSISTENT Sx of RADICULOPATHY Date of Onset:

Exam Data/Objective Findings:

Lab & X-ray Data: L4,5 + L3,4 : foraminal impingement on L4/5

Current Medications:

Failed Outpatient Therapies:

Enrolled in Chronic Care Clinic (s)? Yes No Which Clinic(s)?

Other Diagnosis:

Comments: Pt REQUESTS OTHER THAN ORTHOPEDIST - AGREE

Site Medical Provider: DURST, MD Signature: Janet M. M. Date: 2-8-06

Surge: _____ Date: _____ Site Medical Director: _____ Date: _____

Criteria Source: M&R InterQual

Notes:

3/8

103°

Other(specify):

Criteria Met: Criteria Not Met: More Info Needed

Review #:

Res: DB Date: 2/13/06

Notify physician or midlevel practitioner immediately if unable to gain appointment within 4 weeks. If service is not completed in 4 weeks, have patient re-evaluated by physician or midlevel practitioner to determine if service is still necessary and appropriate.

Certificate of Service

I, William A. Newsom hereby certify that I have served a true and correct copy(ies) of the attached Brief in Opposition to Defendant FCM's Motion to Dismiss upon the following parties/persons:

To: Daniel McKenty
1225 N. King St., Suite 1100
P.O. Box 397
Wilmington, Delaware 19899

To: Eileen Kelly, DAG
Civil Division
820 N. French St.
Wilmington, Delaware 19801

To: U.S. District Court
844 N. King St.
Lockbox 18
Wilmington, Delaware 19801

To:

To:

To:

BY PLACING IN A SEALED ENVELOPE, and depositing same in the United States Mail at the Delaware Correction Center, Smyrna, DE 19977.

On this 29th day of August, 2007

William A. Newsom

William A. Newsom

SBI # 257317